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Supreme Court, U.S.
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No. _____

# IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1989

**JAMES A. LYNAUGH,**
*Petitioner,*

**v.**

**CARROLL F. YOUNGBLOOD,**
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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48pp

## QUESTIONS PRESENTED

1. Whether the retroactive application of a law that does not punish as a crime an act previously committed, which was innocent when done; that does not make more burdensome the punishment for a crime, after its commission, and that does not deprive one charged with crime of any defense available according to law at the time when the act was committed, violates the *Ex Post Facto* Clause, Article I, §10 of the United States Constitution.

2. Whether the retroactive application of a purely procedural change in the law--pursuant to which a state appellate court is allowed to reform a judgment in a criminal case to delete an unauthorized punishment--violates the *Ex Post Facto* Clause.

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No. _____

**IN THE**
**UNITED STATES SUPREME COURT**
**OCTOBER TERM, 1989**

---

**JAMES A. LYNAUGH,**
***Petitioner,***

**v.**

**CARROLL F. YOUNGBLOOD,**
***Respondent.***

---

# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, by and through his attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari.[1]

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit reversing the district court's denial of habeas relief is attached hereto as Appendix D. *Youngblood v. Lynaugh*, ___ F.2d ___, No. 88-2888 (5th Cir. Sept. 8, 1989). The order of the court of appeals denying the state's suggestion of rehearing *en banc* is attached as Appendix E. The opinion of the federal district court denying habeas relief is attached as Appendix C.

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[1] For clarity, the Petitioner is referred to as "the state," and Respondent as "Youngblood."

*Youngblood v. Lynaugh*, No. TY-86-211-CA (E.D. Tex. Sept. 13, 1988). The opinion of the Texas Court of Criminal Appeals denying Youngblood's state habeas application is attached as Appendix B. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985) (en banc). The order of the state convicting court recommending that habeas relief be granted is attached as Appendix A. *Ex parte Youngblood*, No. 7-81-102.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1989. A timely filed suggestion of rehearing *en banc* was denied on October 19, 1989. This petition for writ of certiorari is filed within 30 days after final judgment in the court below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. Art. I, § 10, cl. 1 provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1989) provides as follows:



> If the jury assessed punishment in a case and in the verdict assesses both punishment that is authorized by law for the offense and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

## STATEMENT OF THE CASE

### *A. Course of Proceedings and Disposition Below*

The state has lawful and valid custody of Youngblood pursuant to a judgment and sentence of the 7th District Court of Smith County, Texas, in Cause No. 7-81-102-A, styled *The State of Texas v. Carroll F. Youngblood*. On March 17, 1982, Youngblood was convicted on his plea of "not guilty" of the first-degree felony offense of aggravated sexual abuse. Youngblood pled "true" to a prior conviction alleged for enhancement of punishment (SF II 299),[2] and the court instructed the jury that the proper punishment was "confinement in the Texas Department of Corrections for life or for any term of years not less than fifteen (15) nor more than ninety-nine (99). In addition, you may assess a fine not to exceed $10,000.00." (Tr. 27). The jury found that Youngblood had been previously

[2] "R." refers to the federal record on appeal by page number; "SF" refers to the statement of facts of Youngblood's trial, and "Tr." refers to the transcript.

convicted of a felony and assessed punishment at life imprisonment and a fine of $10,000.00.

Youngblood's conviction was affirmed in an unpublished opinion delivered by the Twelfth District Court of Appeals of Texas on August 13, 1984. *Youngblood v. State*, No. 12-82-0050-CR. He then filed an application for state writ of habeas corpus challenging his conviction and sentence. The state convicting court, relying on *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc), found that Youngblood was entitled to a new trial because the judgment contained a fine which was unauthorized by state law (Appendix, hereinafter "App.," A). On October 16, 1985, the Texas Court of Criminal Appeals delivered an opinion in which it found that the fine was not authorized by law, and--acting pursuant to Article 37.10(b) of the Texas Code of Criminal Procedure, which became effective June 11, 1985--reformed the judgment to delete the fine. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985) (en banc) (App. B).

On June 23, 1986, Youngblood filed an application for writ of habeas corpus in federal district court alleging that the retroactive application of Article 37.10(b) to his case violated the *Ex Post Facto* Clause (R. 52-69). Without requiring a response from the state, the district court summarily dismissed Youngblood's federal writ (R. 51). On November 5, 1986, Youngblood filed a motion to reconsider, and the district court withdrew its previous order and set a hearing to hear arguments on the issues raised by Youngblood (ROA 28). After the hearing the state filed a motion to dismiss for failure to exhaust state remedies and an answer (R. 15-25). On September 13, 1988, the district court denied the state's exhaustion motion and also denied habeas relief, finding that the retroactive



application of Article 37.10(b) does not violate the federal constitutional prohibition against *ex post facto* laws (App. C 5-6). Youngblood appealed, and on September 8, 1989, the court of appeals reversed, concluding that there had been an *ex post facto* violation (App. D 10). On October 19, 1989, the court of appeals denied the state's suggestion of rehearing *en banc* (App. E).

### *B. Statement of Facts*

The state presented evidence at the guilt-innocence phase of trial that Youngblood, wielding a knife, abducted a 20-year-old married woman from her home. He forced his victim to drive to a secluded spot where they parked for four hours while he fondled her and performed oral sodomy on her; Youngblood also forced his victim to perform oral sodomy on him, and he ejaculated into her mouth.

Upon returning to the victim's home, she and Youngblood were seen by the victim's husband and brother, who gave chase. The chase ended with the victim's car crashing head-first into a police car, breaking her jaw and knocking out four of her teeth. Youngblood did not testify or present any evidence.

## SUMMARY OF ARGUMENT

There are special and important reasons to grant the writ. The court of appeals erred in finding that Youngblood suffered an *ex post facto* violation, and its decision is in irreconcilable conflict with the decisions of the Court of Appeals for the Fourth Circuit in *Evans v. Thompson*, 881 F.2d 117, 120-21 (4th Cir. 1989), the Arkansas Supreme Court in *Pickens v. State*, 730 S.W.2d 230, 235 (Ark.), *cert. denied*, ___U.S. ___, 108 S.Ct. 269 (1987), and the Utah Supreme Court in *State*

*v. Norton*, 675 P.2d 577, 585-87 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984).

Further, the decision of the court below is simply an incorrect interpretation of prior decisions of this Court. The retroactive application of Article 37.10(b) did not violate any of the established tests for resolving *ex post facto* claims. The change in law wrought by the statute was purely procedural, and its application to Youngblood's case did not deprive him of any substantial right. Moreover, there was no *ex post facto* violation because Youngblood was not deprived of "fair warning" by the application of the statute to his case.

## REASONS FOR GRANTING THE WRIT

### I.

### THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

#### *A. Certiorari should be granted to resolve an irreconcilable conflict of authority on an important, recurring issue of constitutional law.*

Rule 17 of the rules of this Court provides that a "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." An irreconcilable conflict between decisions of two courts of appeals is a well established ground for granting certiorari, *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982), as is a conflict between a court of appeals and the highest court of a state. *Lakeside v. Oregon*, 435 U.S. 333, 336 & n.3 (1978). Here, both circumstances are present, as the Fifth



Circuit has decided an important point of federal constitutional law directly in conflict with decisions of the Court of Appeals for the Fourth Circuit, the Arkansas Supreme Court and the Utah Supreme Court.

On at least three occasions courts have rejected *ex post facto* challenges to the retrospective application of procedural law changes which are indistinguishable in principle from that involved in the case at bar. *Evans v. Thompson*, 881 F.2d 117, 120-21 (4th Cir. 1989); *Pickens v. State, 730 S.W.2d* 230, 235 (Ark.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 262 (1987); *State v. Norton*, 675 P.2d 577, 585-87 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984). Thus, the decision of the court below, if allowed to stand, will have a deleterious impact on the administration of justice far greater than the Texas cases which it directly affects.

#### *B. Certiorari should be granted to correct an ill reasoned and clearly erroneous interpretation of federal constitutional law.*

There are two ways to view the opinion of the court below, either of which constitutes a compelling reason why the Court should exercise its certiorari jurisdiction. As discussed in Part II, *infra*, the state is convinced that the opinion of the court below is in irreconcilable conflict with numerous prior decisions of this Court construing the *Ex Post Facto* Clause. Simply put, the court of appeals erred in finding an *ex post facto* violation because the change in law which was retroactively applied to Youngblood's case was purely procedural in nature and did not punish previously innocent conduct, increase the punishment for an act previously committed or deprive Youngblood of an existing defense. Under the state's view of the case, the

Court should grant certiorari to correct a glaring error of federal constitutional law.

Two of the three judges on the panel of the court below did not join the opinion but instead filed concurring opinions. Both concurring opinions were of the view that this Court's *ex post facto* decisions are so unclear as to provide no guidance for inferior courts. As Judge Jones stated in her concurrence:

> If we are to continue to hold that "procedural" changes that do not affect the traditional *ex post facto* concerns--the definition of a proscribed or criminal act or its punishment or available defenses--nevertheless run afoul of the clause, I fear that the Supreme Court's decisions offer little guidance for distinguishing among such procedural cases. In the absence of such guidance, I can see no overriding principle from which to disagree with the majority's conclusion that *this* procedural change so substantially affected the defendant's rights as to violate the *ex post facto* clause.

(App. D 12). Judge Gee, also concurring, agreed with Judge Jones that prior precedent of this Court "constitutes more of a bright spectrum than a bright line." (App. D 10). Thus, under the view of two of the three judges who decided this case in the court below, certiorari should be granted to assist the courts of appeals and state courts of last resort in dealing with similar issues.



## II.

## THE RETROACTIVE APPLICATION OF ARTICLE 37.10(b) DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION.

On June 11, 1985, Article 37.10(b) of the Texas Code of Criminal Procedure became effective. That statute provides that when a jury verdict assesses both a punishment that is authorized by law and one that is not, the trial court shall reform the verdict, and if the trial court fails to do so, "the appellate court shall reform the verdict as provided by this subsection." Prior to the enactment of Article 37.10(b), a verdict which contained an unauthorized punishment required reversal of the conviction and an entire new trial on both guilt-innocence and punishment. *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc). The *Bogany* court had reasoned that an entire new trial was required because it lacked authority to change the verdict rendered by the jury. *Id.* at 959.

The first case to come before the Court of Criminal Appeals following the passage of Article 37.10(b) was *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985), in which the court applied the statute to reform a verdict and judgment pronounced in 1980 in which an impermissible fine had been imposed in addition to incarceration. The *Johnson* court rejected the petitioner's *ex post facto* claim, reasoning as follows:

> Since the amendment does not constitute substantive law defining criminal acts or providing for penalties, it is procedural in nature. Thus, in the absence

> of express legislative intent to the contrary, the new law controls litigation from its effective date and applies to both pending and future actions. *See Wade v. State*, 572 S.W.2d 533 (Tex.Cr.App. 1978), and cases cited therein at 534. See also *Patterson v. State*, 650 S.W.2d 453 (Tex.App. - Houston [14th] 1982). We must therefore follow the Legislature's mandate and reform that portion of the verdict unauthorized by law.

*Id.* at 607-08. The Court of Criminal Appeals, relying on *Johnson*, similarly reformed the judgment in Youngblood's case. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985) (App. B 2).

### A. *Retroactive application of Article 37.10(b) does not violate the* Ex Post Facto *Clause because it does not punish as a crime an act previously committed, which was innocent when done; does not make more burdensome the punishment for a crime, after its commission, and does not deprive one charged with crime of any defense available according to law at the time when the act was committed.*

The time-honored standard for judging whether retroactive application of a law is unconstitutionally *ex post facto* is set out in *Beazell v. Ohio*, 269 U.S. 167 (1925):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done;



> which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

*Id.* at 169-70, quoted in *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

The opinion of the court below did not find, nor could it, that Article 37.10(b) is constitutionally infirm under the above test. Instead, the court below applied a different analysis:

> Clearly then, determination of the question whether a statute punishes a previously innocent act, or makes more burdensome the standard of proof, or eliminates a defense that was available at the time the act was committed cannot be dispositive of the inquiry whether such a statute violated the *Ex Post Facto* clause. Once it is determined that the law in question was applied retrospectively, the salient issue becomes whether the law operated to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed, not whether the circumstances of its application conform to a paradigmatic or illustrative category of harms.

(App. D 8). The court of appeals' reasoning is at odds with many decisions of this Court and is wholly inconsistent with the spirit of the *Ex Post Facto* Clause, as discussed below.

### B. *Because the change wrought by Article 37.10(b) was purely procedural and did not deprive Youngblood of any substantial right, its retroactive application did not violate the* Ex Post Facto *Clause.*

Since *Hopt v. Utah*, 110 U.S. 574 (1884), it has been settled that the retroactive application of a purely procedural change in the law does not run afoul of the *Ex Post Facto* Clause. This is true even in cases in which the change in law works to the disadvantage of the defendant. *Dobbert*, 432 U.S. at 293; *United States v. Crabtree*, 754 F.2d 1200, 1202 (5th Cir. 1985).

While the court below acknowledged the distinction between procedural and substantive changes, it reasoned that even procedural changes can be unconstitutionally *ex post facto* if they "operate to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed . . . ." (App. D 8). Thus, under the court of appeals' view, Youngblood is entitled to federal habeas relief because the retroactive application of Article 37.10(b) deprived him of what it found to be a "substantial right."

The reasoning which led to the court below's finding of substantiality is, at best, suspect. The opinion first expresses the view that the state law right to an entire new trial must be substantial because Article 37.10(b) was enacted to abolish it (App. D 8-9). Under this rationale, of course, any change in the law which disadvantages a defendant necessarily will lead to the conclusion that he has been deprived of a substantial right. Such circular reasoning cannot support the conclusion that prior law embraced a "substantial" right.



The opinion of the court below did not rest solely on this ground, however.

> [G]iven the universal references in the *ex post facto* jurisprudence to such concepts as "material disadvantage" and substantial "protection," we are confident that the right to have one's guilt retried before a different jury--with its attendant possibility that the outcome might be different the second time around--is comfortably encompassed within the category of rights considered "substantial."

(App. D 9).

Again, the opinion of the court of appeals paints much too broadly. One need only peruse the list of cases cited in Judge Jones' concurrence (App. D 11) to appreciate how this Court has repeatedly rejected *ex post facto* challenges to laws which operated to the material disadvantage of defendants. That the retroactive application of a law disadvantages a defendant cannot be the test as to whether any deprivation he suffered should be characterized as "substantial." *See, e.g., Beazell v. Ohio*, 269 U.S. at 171 ("[S]tatutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and insubstantial manner to his disadvantage, are not prohibited.").

More fundamentally, however, the state cannot fathom how a quirk in state law that provides for two trials--even when the first is error-free, as was Youngblood's--can properly be termed "substantial." Texas law prior to the enactment of Article 37.10(b) represented nothing more than a mere fortuity with no basis in law or logic. Any harm a defendant suffered

due to retroactive application of the statute could only be characterized as "limited and insubstantial."

Youngblood's case perfectly illustrates the hollowness of the proceedings mandated by pre-37.10(b) law. The court below found the right to a whole new trial to be substantial because "the outcome might be different the second time around . . . . " (App. D 8). Whatever validity that view might have in some other context, it has none in this case. The evidence against Youngblood was not just overwhelming--it was conclusive as to his guilt. The defense offered *no evidence*, and the record is devoid of any basis on which another jury might have reached a different result than did Youngblood's first jury. To find an *ex post facto* violation in this case "mocks the substance of the *Ex Post Facto* Clause." *Dobbert*, 432 U.S. at 297.

### C. *The court of appeals incorrectly focused on whether Youngblood was deprived of an existing right by the retroactive application of Article 37.10(b) rather than whether it deprived him of a lack of notice.*

Finally, the court below attached entirely too much significance to whether prior law accorded Youngblood a "right" to an entire new trial.

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.



*Weaver v. Graham*, 450 U.S. 24, 30 (1981). To the same effect are this Court's decisions invalidating retrospective judicial decisions. *See, e.g., Marks v. United States*, 430 U.S. 188, 195 (1977) (retrospective application of pornography standards of *Miller v. California*, 413 U.S. 15 (1973), deprived petitioner of "fair warning"); *Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964) (petitioners not given "fair warning" of unforeseen judicial construction of trespassing statute).

Here, Youngblood was put on notice at the time he decided to violate the sanctity of another citizen's home and person that his actions could result in imprisonment for life, which they did. He cannot seriously argue that he would have refrained from this conduct had he known that Article 37.10(b) would be enacted several years later and applied to his case. The retroactive application of the statute to Youngblood's case did not deprive him of fair notice of the criminal sanctions to which his unlawful conduct was subject.

## CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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## APPENDIX A

## CAUSE NO. 7-81-102

| | | |
|---|---|---|
| EX PARTE | )( | IN THE 7TH JUDICIAL |
| CARROL FRANK YOUNGBLOOD | )( | DISTRICT COURT OF |
| *Petitioner* | )( | |
| | )( | SMITH COUNTY, TEXAS |

## NATURE AND HISTORY OF THE CASE

This is a pro se application for Writ of Habeas Corpus, post-conviction, pursuant to Art. 11.07, C.C.P. Petitioner was tried by a jury and found Guilty of Aggravated Sexual Abuse under an indictment charging him with that offense, and adding an enhancement count of a prior felony conviction. In its assessment of punishment, the jury fixed the punishment at imprisonment for life, and in addition, was assessed a fine of $10,000.00.

Petitioner pursued a direct appeal, and lost. He now collaterally attacks the judgment and sentence under which he is confined, raising a single ground for relief.

## PETITIONER'S CONTENTION

Petitioner contends that his judgment and sentence is void, since no fine is authorized by Sec. 12.42, V.T.C.A. Penal Code. He relies on *Bogany v. State*, 661 S.W. /2/957. See also *Ex Parte Spaulding*, No. 69,371.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner's application and the record brings him squarely within the holdings of the Court of Criminal Appeals in both referenced cases.

2. Being bound to follow the law as enunciated by a majority of the Court of Criminal Appeals, this Court must reluctantly recommend that the writ be granted, the judgment and sentence be set aside, and Petitioner remanded to this Court for re-trial.

## ORDERS OF THE COURT

The Court orders that a copy of this order be certified to the Court of Criminal Appeals for disposition and a copy forwarded to Petitioner, Carroll Frank Youngblood #288242, P.O. Box 32, Huntsville Unit, Huntsville, Texas 77348.

Dated April 2, 1985.

/S/

DISTRICT JUDGE PRESIDING



## APPENDIX B

**EX PARTE CARROLL FRANK YOUNGBLOOD** — **Habeas Corpus Application**

**NO. 69,471** — **from SMITH County**

## OPINION

This is a post-conviction writ of habeas corpus brought pursuant to Art. 11.07, V.A.C.C.P. Applicant was indicted for the offense of aggravated sexual abuse, with a prior felony conviction alleged for enhancement. The jury found applicant guilty of aggravated sexual abuse and he pled "True" to the enhancement paragraph. Punishment was assessed by the jury at confinement for life in the Texas Department of Corrections and a $10,000 fine.

In his application for writ of habeas corpus, applicant contends that the jury's assessment of a $10,000 fine is unauthorized by V.T.C.A. Penal Code, § 12.24(c) and requests that the judgment and sentence be set aside and a new trial ordered, citing *Bogany v. State*, 661 S.W.2d 957 (Tex Cr. App. 1983).

Section 12.42(c), supra, provides:

> "If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years."

No provision is made for assessment of a fine in addition to a term of imprisonment. Thus, the fine imposed in the case at bar was unauthorized by law.

Applicant relies on *Bogany v. State*, 661 S.W.2d 957 (Tex. Cr. App. 1983) wherein we held that a judgment containing a punishment unauthorized by law was void since the court was without authority to correct the infirmity. On June 11, 1985, however, Senate Bill 1349, Acts 69th Leg., became effective. In *Ex parte Johnson*, ___ S.W.2d ___ (Tex Cr. App. No. 69,480, delivered October 9, 1985), we interpreted this amendment to provide a vehicle by which an improper verdict could be reformed, thus correcting the infirmity present in *Bogany*, *supra*. We also held that the amendment applies to pending and future actions. *Ex parte Johnson*, slip op. at 5.

In applying *Ex parte Johnson*, *supra*, to the case at bar, the assessment of $10,000.00 fine was unauthorized. Thus, we need not remand the case for a new trial; rather, we may reform the verdict and judgment and delete the improper fine.

Applicant's request for relief is therefore denied. The judgment in Cause No. 7-81-102 of the 7th Judicial District Court of Smith County is reformed to delete the $10,000.00 fine. The Clerk of this Court shall mail a copy of this Order to the Texas Department of Corrections.

It is so ordered.

Miller, Judge

Delivered October 16, 1985

En Banc

Publish

Tom G. Davis, J., not participating.



**EX PARTE CARROLL FRANK YOUNGBLOOD** — **Habeas Corpus Application**

**NO. 69,471** — **from SMITH County**

## DISSENTING OPINION

Valid reasons why *Ex parte Johnson*, ___S.W.2d ___ (Tex Cr. App., No.69,480, delivered October 9, 1985), was wrongly decided are set forth in the several dissenting opinions therein, and to reprise them here would be redundant. Nevertheless, this proceeding presents an occasion for the Court to determine whether Article 37.10(b) may be gratuitously invoked and applied by this Court in a post conviction habeas proceeding in which a final judgment of conviction imposes a sentence based upon a *verdict of a jury* assessing punishment not authorized by law. The majority fails to address that question, so I will.

First of all, even if valid, on the face of it Article 37.10(b), V.A.C.C.P. has no application. Obviously focusing on *Bogany v. State*, 661 S.W.2d 957 (Tex. Cr. App. 1983), the amendment directs "the appellate court" to reform a jury verdict. The only occasion for an "appellate court" to have jurisdiction to do so is on direct appeal from a judgment of conviction.

In a postconviction habeas corpus proceeding this Court may *hear* a cause "as though originally presented to [it] or as an appeal," Article 11.07, § 3, V.A.C.C.P. Still, as has been often pointed out by the Court, a habeas corpus proceeding may not be used as a substitute for an appeal. *Ex parte Powell*, 558 S.W.2d 480, 481 (Tex. Cr. App. 1977). A postconviction habeas application will not lie to correct errors *qua* errors committed in the trial court. The Court does not *decide* a habeas cause in its capacity as an "appellate court."

Secondly, approaching Article 37.10, supra, from another direction, one notes that Article 11.07, V.A.C.C.P., provides that the procedure it outlines "shall be exclusive . . .," id., §3. Thus, even if Article 37.10 is retrospective in the sense erroneously imputed to it in *Ex parte Johnson*, *supra*, the procedure it purports to authorize is excluded from a habeas corpus proceeding.

Thirdly, relief available in a habeas corpus proceeding to resolve problems of the nature presented here and in *Ex parte Hernandez*, ___S.W.2d ___ (Tex. Cr. App., No. 69,381, this day decided), has been explicated by this Court in, e.g., *Ex parte Hunter*, 616 S.W.2d 626 (Tex. Cr. App. 1981) and *Ex parte Brown*, 575 S.W.2d 517 (Tex. Cr. App. 1979). As stated in *Brown*, "the proper inquiry should be who assessed punishment," for if applicant is entitled to any relief from punishment previously assessed, that which is ordered depends upon whether it had been assessed by judge or by jury. When assessed by a judge, the cause is remanded to the trial court for a hearing on punishment, *e.g.*, *Ex parte Hunter*, 616 S.W.2d 626 (Tex. Cr. App. 1981); when assessed by a jury, the cause is either dismissed if applicant has served requisite time or remanded to the trial court for a new trial, *Ex parte Brown, supra*.

Applicant is entitled to relief in this habeas corpus proceeding. Because the majority denies it, I dissent.

CLINTON, Judge

(Delivered October 16, 1985)

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Onion, P.J. & Teague, J., join



## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION**

| | | |
|---|---|---|
| **CARROLL F. YOUNGBLOOD** | ) | |
| | ) | |
| **VS.** | ) | **CIVIL ACTION NO. TY-86-211-CA** |
| | ) | |
| **JAMES LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS** | ) | |

**ORDER**

On March 17, 1982, the petitioner Carroll F. Youngblood was convicted of aggravated sexual abuse (Tr. 25). The jury assessed punishment of life imprisonment and a fine of $10,000.00 (Tr. 30, 34-35). His conviction was affirmed on appeal on August 13, 1984. Subsequently, Youngblood filed an application for a writ of habeas corpus with the Texas Court of Criminal Appeals. Youngblood relied upon *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983), in which the Texas Court of Criminal Appeals held that the enhancement provision, Section 12.42(c), Tex. Penal Code (West 1974), does not authorize the punishment to include a fine in addition to a prison sentence. The court in *Bogany* concluded that the jury's verdict was void at its inception, and reversed the judgment. *Bogany v. State*, 661 S.W.2d, at 959.

After *Bogany* was decided, the Texas Legislature enacted Article 37.10(b), Tex. Code Crim. Proc. (West Supp. 1988), which provides:

> If the jury assesses punishment in a case and the verdict assesses both punishment

> that is authorized by law for the offense, and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

This provision became effective on June 11, 1985. On October 9, 1985, the Texas Court of Criminal Appeals announced its decision in *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985), which held that Article 37.10(b) is procedural in nature and can be applied retroactively. In a dissent, Presiding Judge Onion expressed the opinion that the retroactive application of the provision violated the *Ex Post Facto* Clause. *Ex parte Johnson*, 697 S.W.2d, at 610-612. One week later, on October 16, 1985, the Texas Court of Criminal Appeals denied Youngblood's application for a writ of habeas corpus, basing its decision on *Ex parte Johnson*. As in *Johnson*, the court applied Article 37.10(b) to Youngblood's conviction, although his conviction had already become final. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985).

Youngblood now seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254 from this Court. As grounds for issuance of the writ, he contends that the retroactive application of article 37.10(b) violated the *Ex Post Facto* Clause, United States Constitution, Article I, Section 10, Clause 1. The respondent contends that Youngblood has failed to exhaust his state remedies as required by 28 U.S.C. §2254(b) and (c). Specifically, the respondent argues that Youngblood has not raised his *ex post facto* argument before the



Texas Court of Criminal Appeals; therefore, his federal habeas petition is premature. Alternatively, if the Court so finds that Youngblood has satisfied the exhaustion requirement, then the respondent argues that retroactive application of Article 37.10(b) to Youngblood's case was merely procedural with no substantive effect to violate the *ex post facto* prohibition.

*Exhaustion of State Remedies Question*

Youngblood argues that Presiding Judge Onion's discussion of the *ex post facto* question in *ex parte Johnson* obviated the need to again raise the issue before the Texas Court of Criminal Appeals. In his dissent, Presiding Judge Onion posed the question whether Article 37.10(b) could be applied retroactively. He then quoted Article I, Section 16 of the Texas Constitution which provides:

> No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligations of contracts, shall be made.

Next Presiding Judge Onion quoted extensively from an interpretive commentary of the above-quoted state constitutional provision. That commentary defines an *ex post facto* law and notes that the Texas Constitution goes further than the United States Constitution for the former is not confined to forbidding *ex post facto* laws, but also bans any retroactive law. *Ex parte Johnson*, 697 S.W.2d, at 609-610. As stated *supra*, a majority of the Texas Court of Criminal Appeals relied upon *Johnson* to deny Youngblood's application for a writ of habeas corpus. *Ex parte Youngblood*, 698 S.W.2d, at 672. Judge Clinton, joined by Presiding Judge Onion and Judge Teague, stated in a dissent that, for the reasons set forth in the dissenting opinion in *Johnson*, *Johnson* was wrongly decided. *Ex parte*

*Youngblood*, 698 S.W.2d, at 672. One of those reasons, of course, included Presiding Judge Onion's discussion of *ex post facto* problem encountered when applying Article 37.10(b) retroactively.

After thoroughly reviewing Youngblood's state application for a writ of habeas corpus, the Court finds that he did not specifically raise the *ex post facto* issue before the Texas Court of Criminal Appeals. However, his failure to do so does not bar him from the federal courthouse. Federal habeas petitioners need not exhaust state remedies where it is plain that to resort to the state courts would be futile. *United States ex rel. Reis v. Wainwright*, 525 F.2d 1269, 1272 (5th Cir. 1976). Here a majority of the Texas Court of Criminal Appeals has twice rejected Presiding Judge Onion's position that retroactive application of Article 37.10(b) constitutes a prohibited *ex post facto* law. *See United States ex rel. Reis v. Wainwright*, 525 F.2d, at 1272. *See also Gartrell v. Lynaugh*, 833 F.2d 527, 528-529 (5th Cir. 1987). There is nothing in this Court's review of prevailing state law to indicate that the Texas Court of Criminal Appeals will retreat from its *Johnson* and *Youngblood* decisions by adopting Presiding Judge Onion's dissent. Having found that Youngblood is excused from the exhaustion requirement, the Court shall consider the issue of whether the Texas Court of Criminal Appeals' retroactive application of Article 37.10(b) violated the federal constitutional prohibition of *ex post facto* laws.

*Ex Post Facto Law Question*

Article I, Section 10, Clause 1 of the United States Constitution provides that no State shall pass any *ex post facto* law. An *ex post facto* law (1) makes an action completed before the passing of the law, criminal, and punishes such action; (2) aggravates a crime, or makes it greater than it was, when



committed; (3) changes the punishment and inflicts a greater punishment, than the law annexed to the crime, when committed; or (4) alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *Miller v. Florida*, ___U.S.___, 107 S.Ct. 2446, 2450 (1987). For a criminal law to be *ex post facto*, it must (1) be retroactive (*i.e.*, apply to events occurring before its enactment) and (2) disadvantage the offender affected by it.. *Miller v. Florida*, ___U.S., at ___, 107 S.Ct., at 2451. Although a law may operate to the offender's detriment, no *ex post facto* violation occurs if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt. However, a change in the law that alters a substantive right can be *ex post facto* even if the statute takes a seemingly procedural form. *Miller v. Florida*, ___ U.S., at ___, 107 S.Ct., at 2452-2453. *See Weaver v. Graham*, 450 U.S. 24, 30-31, 101 S.Ct. 960, 965 (1981). Moreover, an unforeseeable judicial enlargement of a criminal statute, applied retroactively may operate as an *ex post facto* law. *Bouie v. City of Columbia*, 378 U.S. 347, 353-354, 84 S.Ct. 1697, 1702-1703 (1964).

It is readily apparent that the Texas Court of Criminal Appeals' application of Article 37.10(b) here was retroactive and disadvantaged Youngblood. Under the law effective at the time his conviction became final, he would have been entitled to a new trial because the jury assessed an unauthorized punishment. However, with the new statute, enacted and applied to his case after his conviction became final, the unauthorized punishment was simply stricken. Although the application of Article 37.10(b) to Youngblood's case appears to satisfy the test for an *ex post facto* law, the retroactive application, however,

does not criminalize and punish a prior action, aggravate a crime when committed, inflict a greater punishment, nor alter the legal rules of evidence. Thus, the retroactive application of Article 37.10(b) does not fall within the classic definition of an *ex post facto* law.

Due to a procedural change, Youngblood lost an entitlement to a new trial. His punishment, however, was not increased (but actually decreased), and the elements of the offense or the ultimate facts necessary to establish guilt were not changed. The Texas Court of Criminal Appeals' retroactive application of Article 37.10(b) does not transgress the federal constitutional prohibition against *ex post facto* laws. It is therefore ORDERED that Youngblood's petition for a writ of habeas corpus be DENIED and his case be DISMISSED.

SIGNED this 13th day of September, 1988.

/s/

ROBERT M. PARKER
UNITED STATES DISTRICT JUDGE



## APPENDIX D

**CARROLL F. YOUNGBLOOD**
**Petitioner - Appellant**

**v.**

**JAMES A. LYNAUGH, Director,**
**Texas Department of Corrections**
**Respondent - Appellee**

**No. 88-2888**

**United States Fifth Court of Appeals,**
**Fifth Circuit**

**Sept. 8, 1989**

Prisoner applied for writ of habeas corpus, contending that the *ex post facto* clause of the Federal Constitution was violated by application against him of a statute which allows an appellate court to reform an unauthorized verdict without the necessity of remanding for retrial. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., denied this writ, and prisoner appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) prisoner was not required to pursue the issue further in state-court proceedings, and (2) as applied against prisoner, the statute was *ex post facto*.

Reversed and remanded.

Gee, Circuit Judge, issued a concurring opinion.

Edith H. Jones, Circuit Judge, issued a concurring opinion.

Before GEE, GARZA, AND JONES, Circuit Judges.

GARZA, Circuit Judge:

This case presents a novel question in the Fifth Circuit under the *Ex Post Facto* clause of the United States Constitution. We are convinced that article 37.10(b) of the Tex. Code Crim. Proc., as applied to petitioner Youngblood under the circumstances of this case, violates the *Ex Post Facto* clause. We therefore REVERSE the district court's decision denying appellant's writ of habeas corpus and REMAND the case for a new trial.

## BACKGROUND

On March 17, 1982, appellant Carroll Youngblood was convicted by a Texas jury of aggravated sexual abuse. He was sentenced to life imprisonment and a fine of $10,000. His conviction was affirmed on appeal. Subsequently, he filed an application for a writ of habeas corpus with the Texas Court of Criminal Appeals, relying upon *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983)(en banc). In *Bogany*, the Texas Court of Criminal Appeals held that the sentence enhancement provision, section 12.42(c) Tex. Penal Code, does not authorize punishment to include a fine in addition to a prison sentence. The *Bogany* court concluded that the jury's verdict was void at its inception. It reversed the judgment and ordered a new trial.

In response to the *Bogany* decision, the Texas Legislature enacted article 37.10(b), Tex. Code Crim. Proc., which permits reformation of a verdict to omit any punishment not authorized by law. Article 37.10(b) eliminates the need to retry a convicted defendant.



This provision went into effect on June 11, 1985. On October 9, 1985, the Texas Court of Criminal Appeals announced its decision in *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985)(en banc), which held that article 37.10(b) is procedural in nature and can be applied retroactively. In dissent, presiding Judge Onion of the Texas Court of Criminal Appeals argued that the retroactive application of article 37.10(b) violated the *Ex Post Facto* clause. One week later, on June 16, 1985, the Texas Court of Criminal Appeals denied Youngblood's application for writ of habeas corpus and, relying upon *Johnson*, applied article 37.10(b) to Youngblood's conviction, thereby deleting the unauthorized fine assessed by the jury.

Youngblood then filed a writ of habeas corpus petition in federal district court contending that the retroactive application of article 37.10(b) violated the *Ex Post Facto* clause of the United States Constitution. The district court dismissed Youngblood's petition. He now appeals from that dismissal.

## DISCUSSION

*Exhaustion of State Remedies.*

[1] The government argues that Youngblood's petition should be denied because he has never presented his federal *ex post facto* claim before a state tribunal in post-conviction proceedings. The district court concluded that forcing appellant to resort to post-conviction proceedings before the Texas Court of Criminal Appeals would be futile. We agree.

The Texas Court of Criminal Appeals decided *Ex parte Johnson* in October of 1985. In that case, the court concluded that art. 37.10(b) was purely procedural and might properly be applied to reform an

unauthorized verdict in cases that were pending at the time of the statute's passage. Also in that case, presiding Judge Onion argued in dissent that retroactive application of art. 37.10(b) violates the *Ex Post Facto* clause. One week after the decision in *Johnson*, the Texas Court of Criminal Appeals relied upon the same reasoning to deny Youngblood's state habeas petition. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985). Thus, it is clear that the *ex post facto* argument urged by Youngblood has been presented to, and rejected by, the Texas Court of Criminal Appeals. The district court was correct to conclude that it would be futile to require Youngblood to pursue this issue in state-court proceedings.

*The Ex Post Facto Clause.*

Nine years after the adoption of the United States Constitution, the Supreme Court had occasion to consider the meaning of the words *ex post facto* as used in Art. I, § 9, cl. 3 and Art. I, §10, cl. 1. In *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798), the Court concluded that an *ex post facto* law is any provision that renders criminal "an action done before the passing of the law and which was innocent when done," or that "makes a crime greater than it was, when committed," or that "inflicts a greater punishment, than the law annexed to the crime, when committed," or that "alters the legal rules of evidence." *Id.*, 3 Dall. at 390.

More recently, the Supreme Court has stated that two critical elements must be present for a law to fall within the *ex post facto* prohibition. First, it " 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" *Miller v. Florida*, 482 U.S. 423, 430, 107 S. Ct. 2446, 2451, 96



L.Ed.2d 351 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L.Ed.2d 17 (1981)). The Court also noted that a law which merely changes "modes of procedure" will not violate the *Ex Post Facto* clause unless it also alters "substantial personal rights" of the accused. *Miller*, 482 U.S. at 430, 107 S.Ct. at 2451 (citing *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L.Ed.2d 344 (1977)). It is uncontroverted that the Texas Court of Criminal Appeals, and the district court below, approved the application of art. 37.10(b) to events that occurred in Youngblood's case before the enactment of the statute. The decision in this case turns upon whether the application of 37.10(b) worked to the disadvantage of the defendant.

At the time Youngblood was convicted, the jury rendered a verdict that was unauthorized by law; it assessed a term of years imprisonment in addition to a $10,000 fine. Also at the time of conviction, assessment of an unauthorized fine rendered the verdict void *ab initio* under Texas law and entitled the defendant to a new trial. Subsequent to Youngbloood's conviction, the Texas legislature passed art. 37.10(b), which allowed an appellate court to reform an unauthorized verdict of the type assessed against Youngblood without the necessity of remanding for retrial. The Texas Court of Criminal Appeals then declared, in *Ex parte Johnson*, 697 S.W.2d 605, 607 (Tex.Cr.App. 1985)(en banc) that art. 37.10(b) could be applied retroactively, to previously void verdicts. The majority concluded that, since the statute "does not constitute substantive law defining criminal acts or providing for penalties, it is procedural in nature." Thus, according to the court, the statute may be applied to pending as well as future cases.

The government urges that "it cannot be argued" that art. 37.10(b) effects substantive changes in the law

when the highest state court yet to consider the question has declared it purely procedural. However, the government misapprehends the authority of this Court to decide whether the retrospective application of a state criminal statute violates the *Ex Post Facto* clause. Whether the standard of punishment established by a later state statute is more onerous than, or worsens the conditions imposed by, its predecessor, is a uniquely federal question which will be determined by the federal courts themselves. *Weaver v. Graham*, 450 U.S. 24, 33, 101 S.Ct. 960, 966, 67 L.Ed.2d 17 (1981); *Lindsey v. Washington*, 301 U.S. 397, 400, 57 S.Ct. 797, 798, 81 L.Ed. 1182 (1937).

The state court's analysis of art. 37.10(b), as applied to Youngblood and others similarly situated, is faulty to the extent that it terminates one step short of a complete examination. In precedents dating back more than a century, the Supreme Court has held that statutes regulating procedure will violate the *Ex Post Facto* clause if they deprive the defendant of a "substantial right given to him by the law in force at the time to which his guilt relates." *Thompson v. Utah*, 170 U.S. 343, 352, 18 S. Ct. 620, 623, 42 L.Ed. 1061 (1897). Procedural statutes must "leave untouched all the substantial protections with which existing law surrounds the person accused of crime." *Id.*, citing *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S.Ct. 570, 572, 38 L. Ed.485 (1894).

Thus, we may accept the state court's characterization of 37.10(b) as procedural and still disagree with its conclusion in *Ex Parte Johnson* that the statute's application in these circumstances suffers from no *ex post facto* infirmity. The question is whether Youngblood's right to retrial, to which he was entitled before the passage of art. 37.10(b), was a "substantial



protection" within the meaning of the Supreme Court's *ex post facto* jurisprudence.

The government argues that the retroactive application of art. 37.10(b) cannot offend the *Ex Post Facto* clause because it does not punish as a crime a previously innocent act, or make more burdensome the punishment of a crime after its commission or deprive the defendant of a defense available at the time the act was committed. Likewise, the authorities appended to the government's brief erroneously suggest that a statute must fit neatly within the confines of one of these enumerated pigeon holes or else it may not rightly be said to violate the *Ex Post Facto* clause.

These authorities fail to consider the import of *Thompson v. Utah, supra*, wherein the Supreme Court held that a law which authorized a jury of only eight persons, instead of twelve, to pass upon the guilt of the defendant, when applied retroactively, violated the *Ex Post Facto* clause. In that case, there was no punishment of a previously innocent act, there was no change in the burden of proof required to establish guilt and there was no elimination of a previously available defense. The focus in *Thompson v. Utah* was upon whether retrospective deprivation of the right to trial before a jury composed of twelve persons rather than eight materially altered the position of the defendant to his disadvantage.[1]

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[1]We recognize that, in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court set aside the requirement implicitly established in *Thompson v. Utah* that deliberation by a twelve-member jury is a constitutional prerequisite to a finding of guilt. This revision of one of the issues in *Thompson v. Utah*, however, left intact the proposition for which we cite that case: an *ex post facto* violation may occur in the absence of an increase in punishment, or a change in the burden of proof or an elimination of a previously available defense.

[2] In two other early cases, the Supreme Court instructed that a statute need not relate to a crime, or inflict a punishment, in the judicial sense, for the commission of past crimes, in order to constitute an *ex post facto* law. In *Cummings v. The State of Missouri*, 4 Wall. 377, 18 L.Ed. 356 (1866), the Court held that the exclusion of a minister from the exercise of his clerical function unless he agreed to take an oath that he had not engaged in or encouraged armed aggression against the United States government was an *ex post facto* law. Similarly, in *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366 (1866), the Court found that the exclusion of a lawyer from practice for his refusal to take the oath described in *Cummings, supra*, was *ex post facto*. Clearly then, determination of the question whether a statute punishes a previously innocent act, or makes more burdensome the standard of proof, or eliminates a defense that was available at the time the act was committed cannot be dispositive of the inquiry whether such a statute violated the *Ex Post Facto* clause. Once it is determined that the law in question was applied retrospectively, the salient issue becomes whether the law operated to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed, not whether the circumstances of its application conform to a paradigmatic or illustrative category of harms.

[3] At the time of Youngblood's conviction, it was the law of Texas that a verdict of the type rendered in this case was void *ab initio* and its imposition entitled the accused to a new trial. That right, with its attendant possibility that a second jury just might acquit the defendant, was apparently considered sufficiently "substantial" to provoke the Texas legislature to enact art. 13.10(b), authorizing an appellate court to reform the verdict and thereby deprive the defendant of the right to retrial. In any



event, whether or not the Texas legislature perceived the *Bogany* right to be substantial, we conclude that it was.

Prior Texas law made it impossible to deprive defendants such as Youngblood of their liberty without affording them a new trial. Whether or not it is a wise policy to provide that level of protection against unauthorized verdicts, it cannot be gainsaid, in our opinion, that the subsequent elimination of that right worked to appellant's disadvantage.[2] Delineation of the boundary between "substantial" rights and those considered not substantial, like the distinction between fundamental and non-fundamental rights, is an inquiry not susceptible of examination by scientific formulae or comprehensive enumeration. However, given the universal references in the *ex post facto* jurisprudence to such concepts as "material disadvantage" and substantial "protection," we are confident that the right to have one's guilt retried before a different jury--with its attendant possibility that the outcome might be different the second time around--is comfortably encompassed within the category of rights considered "substantial."

Appellant was sentenced under a procedure that was not authorized by Texas law at the time of the

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[2]We find understandable the Texas legislature's distaste for a rule of law that affords convicted criminal defendants a "second bite at the apple." Given the vicissitudes of a criminal trial before a jury, such a second chance bestows a considerable benefit upon a defendant at the same time that it imposes an unnecessary burden upon the state. In that regard, article 37.10(b) may well effect wise public policy. However, we may not allow consideration of public policy to interfere with the central inquiry before us: whether the retroactive application of art. 37.10(b) worked to the disadvantage of Youngblood in the exercise of a substantial protection.

commission of his offense. The retroactive application of art. 37.10(b) altered his right to retrial--a substantial right--to his material disadvantage. As applied to Youngblood, therefore, art. 37.10(b) is *ex post facto*. For the reasons set out above, we REVERSE the district court's decision denying appellant's writ of habeas corpus and REMAND this case for a new trial.

GEE, concurring:

Concurring entirely in the majority opinion in this very close case, I also agree with Judge Jones's observations regarding the Supreme Court's "modes of procedure" authorities such as *Thompson v. Utah*. Their present state constitutes more of a bright spectrum than a bright line.

EDITH H. JONES, concurring.

I concur with the majority opinion because, for *ex post facto* purposes, I cannot perceive a meaningful distinction between *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42L.Ed. 1061 (1897), and this case. *Thompson* acknowledged that "mere modes of procedure" are not within the ken of the *ex post facto* clause, but it proceeded to hold that the right to be tried by twelve jurors "was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty," and was enjoyed by the defendant at the time he committed the offense charge. 170 U.S. at 352, 18 S.Ct. at 623. Consequently, Utah's "procedural" change to permit criminal trials before eight jurors was held to operate *ex post facto* to deprive the defendant of this substantial right.

I suggest, however, that the distinction between "mere modes of procedure" and substantial or vital procedural protections is a wobbly one under current



Supreme Court jurisprudence. One other early case seems squarely to hold that a procedural change in state law violated the *ex post facto* clause. *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1882) (change in the law applicable to guilty pleas, which exposed defendant to conviction for a more serious crime, and operated retroactively, violated *ex post facto* clause). A number of other decisions have found no *ex post facto* violation in retroactive "procedural" changes. *See Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (change in role of Florida juries in death penalty cases); *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925) (defendant forced to undergo joint rather than separate trial for crime); *Mallett v. North Carolina*, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed. 1015 (1901) (state allowed to appeal from intermediate court's award of new trial to defendant); *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898) (prior to second trial, law was changed to make circumstantial evidence admissible against the defendant and he was convicted); *Gibson v. Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (change in juror qualifications); *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) (change to allow convicted felon to testify as a witness against defendant).

There is little doubt that the defendant in several of these later cases was materially disadvantaged by the changes in criminal procedure which occurred after the commission of his offense. Consider the significance to a defendant of the right to a separate rather than joint trial with co-defendants, (*Beazell*) or of prohibiting testimony of a convicted felon (*Hopt*) or circumstantial evidence (*Thompson*) against a defendant, to say nothing of prohibiting the state's appeal from the grant of a new trial to the defendant

(*Mollett*). The Court emphasized however, in *Dobbert*, that:

> Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.

432 U.S. at 294, 97 S.Ct. at 2298.

If we are to continue to hold that "procedural" changes that do not affect the traditional *ex post facto* concerns--the definition of a proscribed or criminal act or its punishment or available defenses[1]--nevertheless run afoul of the clause, I fear that the Supreme Court's decisions offer little guidance for distinguishing among such procedural cases. In the absence of such guidance, I can see no overriding principle from which to disagree with the majority's conclusion that *this* procedural change so substantially affected the defendant's rights as to violate the *ex post facto* clause.

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[1] In *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925), Mr. Justice Stone summarized the characteristics of an *ex post facto* law:

"It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."



## APPENDIX E

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**No. 88-2888**

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**CARROLL F. YOUNGBLOOD,**
***Petitioner-Appellant,***

**versus**

**JAMES A. LYNAUGH, Director**
**Texas Department of Corrections,**
***Respondent-Appellee.***

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**Appeal from the United States District Court for the Eastern District of Texas**

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**ON SUGGESTION FOR REHEARING EN BANC**

(Opinion September 8, 5 Cir., 1989, __F.2d__)
(October 19, 1989)

Before GEE, GARZA and JONES, Circuit Judges.

PER CURIAM:

(✔) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate

Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/

United States Circuit Judge